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Zoning: Appeal De Novo from Board of Adjustment

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ZONING: APPEAL "DE NOVO" FROM BOARD OF ADJUSTMENT

A troublesome problem has arisen in connection with zoning statutes which vest in the courts power to hear de novo appeals from zoning and planning commissions.[1] It has been held that such a statute is invalid as an attempt to vest a legislative duty in the courts.[2] To avoid the same conclusion, other courts limit the review to typically judicial questions; they review the agency's conclusions of law and determine if factual conclusions are supported by substantial evidence.[3] But there are courts which hold that power to review, de novo, administrative decisions, whatever their character, is quite proper.[4] With these three views, we stand in a shadow of confusion. The question is: which course would be proper for Oklahoma courts in light of the state's constitution and zoning statutes?

In 1964 the Kentucky Court of Appeals was concerned with this exact problem in *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n.* [5] There the court was faced with the validity of a Kentucky statute which provided that an aggrieved party

> . . . may appeal from such action or decision (of the zoning and planning commission) to the circuit court of such county, and jurisdiction is hereby given to such circuit court to hear and determine all questions and issues properly brought before it on such appeal. . . . [H]earing in the circuit court shall be de novo. . . .[6]

The Court of Appeals held that to the extent that it required a "de novo" trial in the circuit court on appeal, the

[1] 1 Cooper, STATE ADMINISTRATIVE LAW, 27-29 (1965).
[2] *E.g.*, Ball v. Jones, 272 Ala. 305, 132 So.2d 120 (1961).
[3] Cooper, *op. cit. supra* note 1, at n. 37.
[4] *E.g.*, *Ex Parte* Darnell, 262 Ala. 71, 76 So.2d 770 (1955).
[5] 379 S.W.2d 450 (Ky. 1964).
[6] KY. REV. STAT. tit. IX; ch. 100, § 100.057 (1962).

statute undertook to impose upon the court a nonjudicial administrative function and thereby violated constitutional provisions for the separation of powers.[7] Looking directly at the legislative delegation involved in this statute, the court said:

> If a court is required to try out independently the propriety of an adjustment in a zoning plan, then the court is simply substituted for the Commission in determining and applying legislative policy to local conditions which require the expertise of an administrative agency. The legislature cannot, by directing a method of appeal procedure, impose upon the courts administrative duties to carry out its policies by discretionary decisions. . . .[8]

Reasoning further that this statute required the court to adjudicate upon administrative rather than judicial considerations, the court held that this type appeal is really no different than the making of an initial discretionary decision, which in the case of zoning, belongs solely to the legislature. *Ball v. Jones*[9] is cited by the court in this case. There the Alabama court held that a statute[10] providing for an appeal from a municipal zoning decision to a circuit court, with a right to trial de novo, attempted to impose upon the circuit court a nonjudicial function concerning a matter exclusively within the power and discretion of the legislative body of the city, and that such statute was violative of sections of the state constitution[11] providing for the separation of powers of the government into three branches. However,

[7] "The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them to be confined to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." KY. CONST. § 27 (1891).

[8] American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Comm'n, *supra* note 5, at 455.

[9] *Supra* note 2.

[10] GEN. ACTS. ALA. No. 729, § 6 (1957).

[11] ALA. CONST., §§ 42, 43 (1901).

in *Ball* the court decided that the "de novo" feature extinguished any right to appeal. This was not the outcome of *American Beauty,* where the Kentucky court preferred the ruling in *California Co. v. State Oil and Gas Bd.*[12] In *California,* the court held invalid a provision of a statute that an appeal to the circuit court from an oil well spacing order of the State Oil and Gas Board shall be tried de novo. The remainder of the statute was upheld so as to authorize an appeal for the limited purpose of determining whether the board's decision was supported by substantial evidence, or whether it was arbitrary or capricious, beyond the power of the board to make, or violative of the constitutional right of the complaining party. It should be noted that Kentucky has held that the function of a county planning and zoning commission is, in part, quasi-judicial.[13] This would give the court a basis for upholding the "de novo" statute, but instead, the decision was based on constitutional and administrative law principles which will not allow such a delegation of a legislative function.

There have been several recent cases dealing with the "de novo-zoning" problem which have been based either upon somewhat different statutes than those discussed above or no statute at all. Where there was no statute prescribing the appeal from a planning and zoning board, the Supreme Court of Errors of Connecticut held that decisions of zoning authorities were to be overruled only when it is found that they had not acted fairly, with proper motives and upon valid reasons.[14] A similar result was reached in Missouri in *Brown v. Beuc,*[15] where it was held that the reviewing court was not vested with power to supervise discretion lodged with the board and was not authorized to hear de novo and to then make such order as in its opinion the board

[12] 200 Miss. 824, 27 So.2d 542 (1946).
[13] *E.g.,* Louisville & Jefferson County Planning and Zoning Comm'n v. Ogden, 307 Ky. 362, 210 S.W.2d 771 (1948).
[14] Verney v. Planning and Zoning Bd. of Appeals of the Town of Greenwich, 151 Conn. 578, 200 A.2d 714 (1964).
[15] 384 S.W.2d 845 (Mo. 1964).

should have made. Working with an entirely different situation, the Appellate Court of Indiana, in *Metropolitan Bd. of Zoning Appeals of Marion County v. Froe Corp.*,[16] held that the trial court erred in trying de novo and substituting its discretion for that of the board. However, in this case the statute provided specifically that the trial was not to be de novo when appealing from a board decision.[17] On the other hand, Georgia has upheld a de novo statute in *Evans v. Augusta-Richmond County Bd. of Zoning Appeals.*[18] It should be pointed out, however, that this case centered around the particular facts involved and was not based upon the constitutional question of delegation. While these cases do not indicate that a statute which grants a de novo hearing on appeal from a zoning board is unconstitutional under the separation of powers theory, they do seem to point up the recognition, by both legislative and judicial elements, of the legislative and discretionary role of the boards and also the general limitations upon the scope of review by the courts.

There have been some recent cases which, while not dealing directly with zoning, do involve the scope of judicial review of state administrative agency orders where a statute has granted de novo hearings. In *Loftin v. George County Bd. of Educ.*,[19] the Mississippi court held that a statute,[20] providing for trial de novo before a jury on an appeal from an order of a county board of education to the circuit court, was unconstitutional. The invalidity was based upon the separation of power provisions of the state constitution,[21] providing for the normal three distinct departments and confining each to its separate magistry. Likewise, a Texas statute[22] provided that a proceeding on appeal to the district

[16] 209 N.E.2d 36 (Ind. 1965).
[17] BURNS' ANN. STAT. OF IND., § 53-979. (1964).
[18] 113 Ga. App. 113, 147 S.E.2d 455 (1966).
[19] 183 So.2d 621 (Miss. 1966).
[20] MISS. CODE, § 6334-05 (1942).
[21] MISS. CONST. art. I, §§ 1, 2 (1890).
[22] VERNON'S TEX. ANN. CIV. STAT. art 4506 (1948).

court by a physician from a decision of the State Board of Medical Examiners revoking licenses "shall be de novo." The Texas Court of Civil Appeals in *Texas State Board of Medical Examiners v. Scott*[23] held that statute unconstitutional because it breached the traditional division of powers between the three departments of state government. Zoning is not the substantive problem involved in these cases. Instead, the courts are dealing with the right to practice medicine in the *Texas* case and orders from the county board of education in the *Loftin* case. But, in both cases, the court decided that de novo hearings were improper because the functions performed by the two boards were of the type which were to be performed solely by the administrative agency involved. Separation of powers keeps the courts from entering into these fields and substituting their determination for that of the board. Therefore, these cases do have a bearing upon our zoning statutes granting de novo appeals as far as the constitutional and administrative law issues go.

Oklahoma's legislature, like that of Kentucky, has established a right to appeal from a decision by the Board of Adjustment, which is established to hear cases and make exceptions to zoning ordinances.[24] It has provided further that ". . . said case shall be heard and tried de novo in the District Court."[25] Distribution of powers, provided for in the Oklahoma Constitution, Article IV, Sec. 1, provides a separation of powers almost identical with that of Kentucky. It reads as follows:

> The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.

[23] 377 S.W.2d 104 (Tex. Civ. App., 1964).
[24] OKLA. STAT. tit. 11, § 407 (1961).
[25] OKLA. STAT. tit. 11, § 408 (1961).

It would therefore seem advantageous to look at the Oklahoma statute in the light of *American Beauty*. Doing this would result in a determination that the de novo provision is in conflict with the above constitutional provision. But, in order to establish invalidity of an Oklahoma statute there should be Oklahoma authority to support the thesis of *Americna Beauty*. Of course, the general proposition exists that zoning regulations are legislative rather than judicial in character.[26] Oklahoma has established an accord with this theory in *Keaton v. Oklahoma City*.[27] In *Keaton*, the court said:

> . . . the State Legislature authorized municipalities to enact zoning ordinances, and when the legislative branch of the municipal government has acted in a particular case, its expressed judgment on the subject will not be overridden by the judiciary, unless the same is unreasonable, arbitrary, or constitutes an unequal exercise of police power.[28]

There the court relied upon *Beveridge v. Harper & Turner Oil Trust*.[29] *Beveridge* involved an attempt by property owners to have a municipal ordinance prohibiting the use of their property for the production of oil and gas declared unconstitutional as being an unreasonable restriction upon the use of their property. The court took this opportunity to thoroughly discuss the nature and role of the zoning authority, the board of adjustment, and the reviewing court, stating:

> . . . we cannot . . . hold that the board of adjustment is in effect a superior legislative body authorized to substitute its judgment for that of the legislative body of the city . . . Nor can the district court, a judicial body, exercise such a power on appeal.[30]

Therefore, in Oklahoma it is recognized that the concept of zoning is legislative and that the role of the judiciary in re-

[26] *E.g.*, 101 C.J.S. *Zoning*, § 1, at n. 26 (1958).
[27] 187 Okla. 593, 102 P.2d 938 (1940), *Cert. denied* 311 U.S. 616 (1940).
[28] Keaton v. Oklahoma City, *supra* note 27, at 938.
[29] 168 Okla. 609, 35 P.2d 435 (1934).
[30] Beveridge v. Harper & Turner Oil Trust, *supra* note 29, at 442.

viewing determinations by the board of adjustment is limited to determining whether or not they were arbitrary and unreasonable.

In holding a trial de novo on appeal from the board of adjustment the question is, what function is the court performing? It is examining the facts of a zoning problem and deciding supposed judicial questions. The result is an exercise by the court of its discretion in controlling the application of the zoning ordinances to individual property owners. Yet the Oklahoma court has still allowed the use of the de novo appeal and the substitution of its orders for those of the board of adjustment.[31]

Re-examining the question in the opening paragraph, there seems but one answer: The separation of governmental functions. The legislative function of providing zoning ordinances should be carried out by the municipal corporation with the board of adjustment to provide hearings for those who desire to become exceptions. Appeals to the district court should deal solely with the judicial questions applicable to a reviewing court. A trial de novo is not only a delegation of legislative authority to the courts; it is also a waste of both expertise in the field of zoning and time of the courts in adjudicating something more properly determined by the board.

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[31] Appeal of Fred Jones Co., 203 Okla. 321, 220 P.2d 245 (1950).